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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

GEORGE W. CHAPMAN, INC., PETITIONER

v.

ROBERT E. SHENK,
BANK OF CLARKE COUNTY,
RESPONDENTS

In the Matter of George W. Chapman, Inc., debtor

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief for Shenk and Bank of Clarke County in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1502

GEORGE W. CHAPMAN, INC., PETITIONER

v.

ROBERT E. SHENK,
BANK OF CLARKE COUNTY,
RESPONDENTS

In the Matter of George W. Chapman, Inc., debtor

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief for Shenk and Bank of Clarke County in Opposition

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit which dismissed Appellant's (Petitioner's) Appeal from the United States District Court for the Western District of Virginia was entered on January 10, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether the judgment of the United States Court of Appeals for the Fourth Circuit, under the facts and circumstances, was within its discretionary powers by denying Appellant's (Petitioner's) motion to grant it an extension of time to file its petition for an appeal, and granted Appellees' (Respondents') motions to dismiss the appeal.

STATUTES INVOLVED

§ 1291 of Title 28, U.S.C.A., p. 344

FINAL DECISIONS OF DISTRICT COURTS

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Federal Rules of Appellate Procedure 28 U.S.C.A., effective July 1, 1968

(Cited herein as F.R.A.P.)

Rule 2. Suspension of Rules

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in

Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Rule 3. Appeal as of Right — How Taken

(a) FILING THE NOTICE OF APPEAL. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292 (b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

Rule 26. Computation and Extension of Time

(b) ENLARGEMENT OF TIME. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

Rule 27. Motions

(a) CONTENT OF MOTIONS; RESPONSE; REPLY. Unless another form is elsewhere prescribed by these rules, an applica-

tion for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order (for which see subdivision (b)) within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(b) DETERMINATION OF MOTIONS FOR PROCEDURAL ORDERS. Notwithstanding the provisions of the preceding paragraph as to motions generally, motions for procedural orders, including any motions under Rule 26(b) may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

Rule 30. Appendix to the Briefs

(a) DUTY OF APPELLANT TO PREPARE AND FILE; CONTENT OF APPENDIX; TIME FOR FILING; NUMBER OF COPIES. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the ap-

pendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix within 40 days of the date on which the record is filed. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

Rule 31. Filing and Service of Briefs

(a) TIME FOR SERVING AND FILING BRIEFS. The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appllee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument.

(c) CONSEQUENCE OF FAILURE TO FILE BRIEFS. If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the court.

Rules of The United States Court of Appeals for the Fourth Circuit Supplementing the Federal Rules of Appellate Procedure (Effective July, 1, 1968) 28 U.S.C.A. Federal Rules of Appellate Procedure, page 333

(Cited herein as Local Rule 7)

ORDER

Pursuant to the authority vested in this court by law and by Rule 47 of the Federal Rules of Appellate Procedure, the following supplemental rules governing the court's practice are adopted, effective July 1, 1968, and shall supersede the court's existing rules, which are hereby rescinded as of said date:

INTRODUCTION

These rules supplement the provisions of law and the rules of the Federal Rules of Appellate Procedure, and exercise the options vested in this court by the latter.

The following table indicates the specific rule of the Federal Rules of Appellate Procedure to which the local rule of this court set opposite supplements:

F.R.A.P. No.	*Local Rule No.*
11	2
27	3
45	4
47	5
46	6
2	7

The attention of the bar is called to the fact that the local rules do not exercise the options contained in Federal Rules of

Appellate Procedure Nos. 11(c), 27(c), 30(a), 30(c), 30(f) and 34(b).

The following table indicates the provisions of the United States Code which the local rule of this court set opposite supplements:

Local Rule No.	*U.S.C.§*
1	Tit. 28, § 48
8	Tit. 18, § 3006A
9	Tit. 28, § 333

7. Pre-argument review; certificates of probable cause; summary dismissal of appeals and denials of certificates of probable cause; notice to appellant or applicant of right to file informal statement and use of same.

(a) In the interest of docket control and to expedite the final disposition of pending cases, the chief judge may, from time to time, designate a panel or panels to review any pending case at any time before argument for assignment or disposition under this rule. The chief judge may also refer to such a panel or panels any application for a certificate of probable cause to appeal a final order in a habeas corpus proceeding where the detention complained of arises out of process by a state court.

(b) If all of the judges of the panel to which a pending appeal has been referred conclude that the appeal is frivolous and entirely without merit, the appeal will be dismissed, or the judgment affirmed. If all the judges of the panel to which a pending appeal has been referred conclude that the judgment below was clearly erroneous, or clearly defective, they may reverse, or vacate the judgment, or grant any other appropriate relief. If all of the judges of the panel to which an application for a certificate of probable cause has been referred conclude that the certificate should not issue, the certificate will be denied; but if any judge of such panel is of the opinion that the issue is debatable, or that full briefing and oral argu-

ment would be enlightening, or otherwise of assistance, the certificate will be issued, and the case set for a regular hearing. A pending appeal may be dismissed, or the judgment appealed from affirmed, reversed, or vacated, or other appropriate relief granted, before the filing of briefs or before oral argument. In the case of an appeal from the denial of a writ of habeas corpus, such summary action may be taken contemporaneously with, or at any time after, action upon the application for a certificate of probable cause.

(c) Omitted — Concerning Certificate of Probable Cause

STATEMENT

On July 25, 1968, the United States District Court for the Western District of Virginia, Harrisonburg, Virginia, entered a Final Order (R. Vol. I, 42)* [Pet. 12] dismissing Petitioner's Petition for Reorganization of a Corporation under Chapter X of the Bankruptcy Act (R. Vol. I, 1-6).

On August 22, 1968, Petitioner filed a Notice of Appeal from the aforesaid Order of July 25, 1968 to the United States Court of Appeals for the Fourth Circuit, (R.Vol. I, 46), [hereinafter referred to as the Court of Appeals].

On September 23, 1968, the Record on appeal in this case was filed and the Appeal docketed by the Honorable Samuel W. Phillips, Clerk of the Court of Appeals, [hereinafter referred to as the Clerk], (R. Vol. II, 1).

On November 4, 1968, a "MOTION" by Petitioner, a part of the Record was marked "Filed Nov. 4, 1968, Samuel W.

*Respondents' statement of the case is restricted to The Record, and not to letters addressed to Petitioner or Petitioner's counsel from the Clerk of the United States Court of Appeals for the Fourth Circuit, or letters from Petitioner or counsel for Petitioner, addressed to the said Clerk.
The Record was prepared in four sections, designated as Vol. I, Vol. II, Supplement to Record, and Second Supplement to Record.

Phillips, Clerk" [Second Supplement to Record]. Said "MOTION" was for an extension of two weeks from November 4, 1968 (the date its printed brief and appendix were due to be served and filed in the Clerk's Office) [Rules 30 and 31 of Federal Rules of Appellate Procedure, effective July 1, 1968], (Infra 4, 5), to allow a newly appointed attorney, who would enter his appearance as special counsel on behalf of Petitioner, and who would "file the Petition of Appeal and present the record to this Honorable Court" (the Court of Appeals). [Second Supplement to Record].

On November 6, 1968, the Clerk of the Court of Appeals received and filed as of the same date motions by counsel for Respondents, in opposition to the aforesaid Motion of Petitioner, with "Bank of Clarke County Exhibits "A", "B", and "C" [Supplement to Record, 7, 8 and 9], accompanied by affidavits [Supplement to Record, 6, 13], with certification that the said motions were mailed to counsel for Petitioner at their respective addresses on the 5th day of November, 1968. [Supplement to Record, 5, 12].

Said respective motions by Respondents: ". . . . and moves this Honorable Court in its discretionary powers to deny an extension of time to allow George W. Chapman, Inc., Appellant's [Petitioner's] new counsel (designated by it as 'special counsel) and who would succeed its present counsel(designated by it as 'special counsel'), namely: Ronald L. Walutes, Esquire, 'to prepare the Petition for Appeal and present the record to perfect said appeal'; and

"To dismiss the Appeal;" [Supplement to Record, 2, 11]. Then followed the reasons for the aforesaid motions [Supplement to Record, 3-5].

The basis for Federal jurisdiction in the Court of first instance was under the Bankruptcy Act, § 24 (c), Title 11 U.S.C. § 47 (c).

ARGUMENT

The Order of the Court of Appeals filed January 10, 1969 (R., Vol. II, 6), [Pet. 11, 12], dismissing Appellant's [now Petitioner's] Appeal is correct, and there is no conflict of decision that calls for further review.

1. This dismissal of Petitioner's Appeal by the Court of Appeals was within its discretionary powers.

The Petitioner on August 22, 1968 filed a timely appeal (R., Vol. I, 46) to the Court of Appeals from the Final Order entered July 25, 1968 by the District Court, which Final Order dismissed Petitioner's Petition for Reorganization of a Corporation under Chapter X of the Bankruptcy Act. (R., Vol. I, 43).

The Record on Appeal was filed and the Appeal was docketed by the Clerk of the Court of Appeals on September 23, 1968 (R., Vol. II, 1).

Two months and some days later, on the date Petitioner's printed brief and apendix were due to be filed in the Clerk's Office, namely, on November 4, 1968, Petitioner's motion was filed (R., Second Supplement to Record) for an extension of two weeks from November 4, 1968 "to prepare the Petition for Appeal and present the record to perfect said appeal" (R., Second Supplement to Record). The aforesaid motion was the only action of prosecution of its appeal (this action requesting a delay) which the Petitioner took from August 22, 1968, the date it filed its Notice of Appeal, to January 10, 1969, when the Court of Appeals dismissed Petitioner's Appeal. (R., Vol. II, 6).

Respondents filed motions on November 6, 1968 to deny any extension of time to Petitioner and for the dismissal of Petitioner's Appeal as is provided by Rule 31. (c) F.R.A.P. (Infra 5).

The Petitioner knew, or should have known, its position

since August 22, 1968, the date its appeal was filed as a matter of right. (R., Vol. I, 46), (Rules 30 (a), 31 (a), (c) F.R.A.P. infra 4, 5).

Weinberger v. Group, Trustee, 399 F. 2d. 34, at 35 (C.A. 1st), [the latter part of second column]:

Two extensions of time for filing the record appendix and brief were granted, the final date of extension being November 24. The Court was in receipt of further motion for extension of time after November 24 had expired. Motion was denied.

PER CURIAM:

> "Appellant knew what his position was since last July. We do not propose, after allowing him the fall to prepare his brief, to give appellees the minimum time, and over the holidays at that.
>
> "An order will be entered denying the motion for further extension of time and dismissing the appeal for want of prosecution."

No excuses were offered by Petitioner in the instant case for the continuous delay in perfecting its appeal; no brief was tendered. One hundred forty-one (141) days (or four months, nineteen days) had elapsed from the date of its Notice of Appeal (August 22, 1968), (R., Vol. I, 46); or, three months, eighteen days from the date the Record was filed and the Appeal docketed in the Court of Appeals (September 23, 1968), (R., Vol. II, 1), until the date the Appeal was dismissed (January 10, 1969), (R., Vol. II, 6).

There was a failure on the part of Petitioner to observe or make any attempt to comply with the Federal Rules of Appellate Procedure. While it is true that its failures may not affect the validity of its appeal, it is grounds for such action as the Court of Appeals might deem appropriate, which may include the dismissal of the appeal, Rule 3. (a) F. R. A. P. (Infra 3).

United States v. Gallagher, 151 F. 2d. 556, at 559 (C.A. 9th).

In this case the appellant had failed to comply with various rules of Federal Rules of Civil Procedure, and no excuse was ever shown.

Clifton Mathews, Circuit Judge, said:—

> "For appellant's failure to comply with Rule 73 (g), 75 (a), and 75 (d) no excuse is shown. The failure does not affect the validity of the appeal, but is ground for such action we deem appropriate. The action we deem appropriate is dismissal of the appeal.
>
> "Motion granted and appeal dismissed."

After the final Order of the Court of Appeals on January 10, 1969, no Petition for Rehearing was filed by Petitioner.

The factual pattern which had developed in the instant case shows that the Court of Appeals acted properly within its discretionary powers. Its judgment of January 10, 1969 would not justify a review of the case.

MacNeil Bros. Company v. Forte, 253 F. 2d. 500, (C.A. 1st); *Larkin v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada*, 338 F. 2d. 335, (C.A. 1st); *Hawke v. McKee*, 391 F. 2d. 262, (C.A. 5th); *Fong v. Glover*, 197 F. 2d. 710, (C.A. 9th); *United Wholesale, Inc. v. Humphrey*, 203 F. 2d. 198, (C.A. 8th).

2. Reply to Petitioner's "Reasons for Granting this Writ".

Paragraph "(1)" states that "no petition for appeal was filed", which is correct; but there was a motion for an extension of time by Petitioner for its new counsel "to prepare the Petition for Appeal and present the record to perfect said appeal." (R., Second Supplement to Record).

As to Paragraph "(2)", there is no place in the Record where the amount in controversy is raised. Petitioner says that the Court of Appeals should have acted upon its motion of November 1, 1968 (filed November 4, 1968), (R., Second Supplement to Record), which it now says is "apparently an error" [Pet. 7, 8], "without reference to the amount in controversy". The Court of Appeals did not have any issue before it about the amount in controversy, so it was not required to act, and did not act upon it, except to look to the Record at large.

In Paragraph "(3)" Petitioner alleges its aforesaid motion was for a procedural order (the one it now says in its Petition was an error); that "the Court could have acted upon it even without waiting for a response from the adverse parties." [Pet. 8]. Rule 27 (b) F.R.A.P. (Infra 4), cited by Petitioner. It says, in part:

> "—motions for procedural orders, including any motions under Rule 26 (b) may be acted upon at any time, without awaiting a response thereto."

But the Court of Appeals did not treat it as a motion for procedural order by its final judgment (R., Vol. II, 6), for if it did, the Court could not have entertained the motions of Respondents opposing the motion of Petitioner, (R., Supplement to Record, 2, 11). Motions for procedural orders, Rule 27. (a) F.R.A.P. (infra 3), says in part:

> "—Any party may file a response in opposition to a motion other than one for a procedural order (for which see subdivision (b)) within 7 days after service of the motion, —"

The Court of Appeals, by its Order of January 10, 1969 (R., Vol. II, 6), did entertain and grant Respondents' motions, which would have been improper if said motions had been motions in opposition to a motion for a procedural order.

Paragraph "(4)": Petitioner states: "Having raised the question of the amount in controversy in the case, a jurisdictional question, the Court ought to have decided the question from an examination of the record." [Pet. 8]. Petitioner does not state who raised the question of the amount in controversy. From the Record, who is to say that the Court did not examine the Record? Respondents submit it did examine the Record. (Local Rule 7, infra 7). There is nothing in the Record about the amount being in controversy, much less as to whom raised it.

Paragraph "(5)": This is not as Petitioner argues — for the Petitioner's motion is marked "Filed, Nov. 4, 1968, Samuel W. Phillips, Clerk." (R., Second Supplement to Record). Rule 26. (b) F.R.A.P. (infra 3) does not state that the Court must —

> "— enlarge the time prescribed by these rules by its order for doing any act, or may permit any act to be done after the expiration of such time —"

Under Rule 31 (c) F.R.A.P. (infra 5):

> "If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for a dismissal of the appeal."

which motion for dismissal Appellees [Respondents] did. (R., Supplement to Record, 2, 11).

Paragraph "(6)": It is agreed that the Notice of Appeal did not affect the validity of the appeal or require the dismissal of the appeal, "but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal." Rule 3, (a) F.R.A.P. (infra 3). The Court of Appeals stated in its Order dismissing the appeal, "that an enlargement of time would not be appropriate, Rule 26 (b) F. R. A. P." [Pet. 11, 12].

Paragraph "(7)": It is within the Court's discretion to allow

a diliatory plea, but the Court of Appeals in the instant case exercised its discretion not to allow an extension of time and to dismiss the appeal; and to enforce the Federal Rules of Appellate Procedure. *In Winters v. Crowley*, 374 F. 2d 317, at 318, (C.A., D.C. 1967), cited by Petitioner [Pet. 10], who states: "– the Circuit Court of Appeals allowed the filing of briefs more than one year after the Notice of Appeal was filed", whereas it was only a matter of days that appellant was late in filing her brief in the District of Columbia Court of Appeals, and then upon disclosure of the circumstances which the United States Court of Appeals, District of Columbia Circuit felt excused her, and remanded to the District of Columbia Court of Appeals for further proceedings.

Paragraph "(8)": Again, it is submitted there is no place in the Record where it shows that the appeal was dismissed on jurisdictional grounds. It had jurisdiction by virtue of § 1291 of Title 28 U.S.C. (Infra 2).

Paragraph "(9)": Respondents submit that their respective motions did comply with the requirements of Rule 27. (a) F.R.A.P. (infra 3); but, if the motions did not, Petitioner never pointed out to the Court of Appeals where Respondents' motions did not comply, and therefore, the inference is that the Court of Appeals must have determined that the motions of Respondents did, or at least did comply sufficiently for it to enter its judgment of January 10, 1969 (R., Vol. II, 6).

3. The Respondents' grounds for their motions in opposition to Petitioner's motion for an extension of time to prepare the Petition for Appeal, were:

Continuing delaying tactics (R., Supplement to Record, 3): Petitioner's motion did not show counsel's inability to affect the timely preparation of the Petition for Appeal and presentation of the record, for there was no disclosure of cause beyond

present counsel's control, or to circumstances which could be deemed excusable neglect to perfect an appeal from the Final Order of the District Court of July 25, 1968 after its Notice of Appeal had been timely filed; and that said motion of Petitioner was not supported by an affidavit, (R., Supplement to Record, 5); and,

The order of relief sought by the Respondents' motions in opposition to the Petitioner's motion was for the appeal to be dismissed.

By the Record in the instant case, there is every indication that the Court of Apeals looked to the Record at large. There was no doubt from the Record it had jurisdiction of the instant case.

It is submitted in the instant case that the Court of Appeals reached its decision on such basis of facts from the Record which would more clearly sustain its judgment for dismissal of Petitioner's Appeal.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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JULY, 1969